APPENDIX

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INDEX TO APPENDIX

A. United States Court of Appeal, Eleventh Circuit, *Order* filed August 23, 2022, denying a motion for certificate of appealability.

B. United States District Court, Middle District of Florida, Ocala Division, *Order* [Doc. 7] dated April 13, 2022, and **Judgment** [Doc. 8] filed April 14, 2022.

APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-11224-E

HEERALALL PURAN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

To merit a certificate of appealability, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Heeralall Puran has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

UNITED STATES CIRCUIT JUDGE

APPENDIX

B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

HEERALALL PURAN,

Petitioner,

v. **Case No. 5:19-cv-537-RBD-PRL**

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.
_____/

ORDER

Petitioner seeks a Writ of Habeas Corpus ("Amended Petition," Doc. 4) under 28 U.S.C. § 2254. Respondents filed a Response. ("Response," Doc. 5). Petitioner filed a Reply ("Reply," Doc. 6), and it is ripe for review.

Petitioner alleges three grounds for relief. However, as discussed hereinafter, the Court finds the Amended Petition is untimely filed.

I. Procedural History

The State Attorney's Office for the Fifth Judicial Circuit in and for Marion County, Florida charged Petitioner by information with sexual battery upon person under twelve years of age. ("Appendix," Doc. 5-1 at 5). The jury found Petitioner guilty as charged. (Doc. 5-7 at 21). The state court sentenced Petitioner

to a sentence of life in prison. (Doc. 5-7 at 37-39). Petitioner appealed. (Doc. 5-7 at 41). Appointed counsel filed an initial brief pursuant to *Anders v. California*, 368 U.S. 738 (1967). (Doc. 5-7 at 43-54). Petitioner then retained counsel to file an initial brief. (Doc. 5-7 at 58-59). Retained counsel also filed an *Anders* brief. (Doc. 5-7 at 64-80). Petitioner then filed a *pro se* brief. (Doc. 5-8 at 2-16). The Fifth District Court of Appeal of Florida ("Fifth DCA") *per curiam* affirmed. (Doc. 5-8 at 21). Mandate issued on August 22, 2014. (Doc. 5-8 at 23).

On May 7, 2015, Petitioner, through counsel, moved for postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure alleging three grounds of ineffective assistance of counsel and one ground of cumulative error. (Doc. 5-8 at 25-68). The state court set an evidentiary hearing on the Rule 3.850 motion. (Doc. 5-8 at 70-72). Petitioner then filed a first amended Rule 3.850 motion (Doc. 5-8 at 74-120) and a second amended Rule 3.850 motion (Doc. 5-8 at 129-78). The evidentiary hearing was held on March 9, 2017. (Doc. 5-8 at 180-420). Petitioner filed a written closing argument. (Doc. 5-8 at 422-52). The state court denied the second amended motion. (Doc. 5-8 at 454-503). Petitioner appealed and the Fifth DCA *per curiam* affirmed. (Doc. 5-8 at 621); *Puran v. State*, 266 So. 3d 854 (Fla. 5th DCA 2019). Mandate issued April 22, 2019. (Doc. 5-8 at 623).

Petitioner filed his federal habeas petition on October 18, 2019. (Doc. 1).

II. Timeliness of the Petition

Under 28 U.S.C. § 2244:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the consideration of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

28 U.S.C. § 2244(d)(1)-(2).

Petitioner's judgment and sentence became final on July 29, 2014, following the Fifth DCA's *per curiam* affirmance of his judgment and sentence. Petitioner then had ninety days, or through October 27, 2014, to petition the Supreme Court

for certiorari. *See Chavers v. Sec'y, Fla. Dep't of Corr.*, 468 F.3d 1273, 1275 (11th Cir. 2006) (holding that entry of judgment and not the issuance of a mandate starts the clock running for time to petition the Supreme Court for certiorari). Thus, Petitioner's conviction became final on October 27, 2014. Therefore, under § 2244(d)(1)(A), Petitioner had through October 27, 2015, absent any tolling, to file a federal habeas petition.

Under § 2244(d)(2), the one-year period would be tolled during the pendency of any properly filed state postconviction proceedings. Petitioner filed his Rule 3.850 motion on May 7, 2015. (Doc. 5-8 at 25-68). A total of 192 days of the one-year limitations period elapsed before Petitioner filed this motion. The limitations period was tolled from May 7, 2015, through April 22, 2019, the date mandate issued on appeal from the denial of the second amended Rule 3.850 motion. (Doc. 5-8 at 623). Petitioner had 173 days of the limitations period remaining, until October 15, 2019,[1] to file his federal habeas petition. The federal habeas petition, filed on October 18, 2019, is untimely filed.

III. Equitable Tolling

To overcome his untimely filing, Petitioner contends that he is entitled to equitable tolling. (Doc. 1 at 11-14; Doc. 6). In support of this claim, Petitioner states

[1] The 173rd day was Saturday, October 12, 2019. *See* Rule 6(a)(1)(C), Fed. R. Civ. P. The following Monday, October 14, 2019, was Columbus Day, a federal holiday. *See* Rule 6(a)(6), Fed. R. Civ. P.

that his "motion was untimely by three days because of a simple math mistake counsel made in calculating the time remaining on the one year deadline." (Doc. 6 at 1).

Equitable tolling is "an extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1225 (11th Cir. 2017) (quoting *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009)). The burden to show that equitable tolling applies "'rests solely on the petitioner' who cannot rely on 'mere conclusory allegations,' which 'are insufficient to raise the issue of equitable tolling.'" *Robinson v. State Attorney for Fla.*, 808 F. App'x 894, 898 (11th Cir. 2020) (quoting *San Martin v. McNeil*, 633 F.3d 1257, 1268 (11th Cir. 2011)). The Supreme Court of the United States held in *Holland v. Florida*, 560 U.S. 631, 649 (2010), that a petitioner is entitled to "equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." (quotation marks omitted). Both elements must be independently satisfied for equitable tolling to apply. *Cadet*, 853 F.3d at 1225.

The Eleventh Circuit has narrowly defined what constitutes "extraordinary circumstances" and held that negligence by an attorney, such as missing a filing deadline, is not extraordinary. *Id.* at 1236. Rather, more is required for equitable tolling to apply, such as abandonment by counsel, "bad faith, dishonesty, divided

loyalty, [or] an attorney's mental impairment." *Brown v. Sec'y, Dep't of Corr.*, 750 F. App'x 915, 929 (11th Cir. 2018).

Petitioner argues that counsel's "simple math mistake" was just a "clerical math error" and should not bar equitable tolling. (Doc. 6 at 1, 6). This argument is without merit. The Supreme Court has held that "a garden variety claim of excusable neglect," *Irwin v. Dep't of Veterans Aff.*, 498 U.S. 89, 96 (1990), such as a simple "miscalculation" that leads a lawyer to miss a filing deadline, *Lawrence v. Florida*, 549 U.S. 327, 336 (2007), does not warrant equitable tolling. *Holland v. Florida*, 560 U.S. 631, 651-52 (2010). Further, the Eleventh Circuit has repeatedly held that negligence by an attorney, such as miscalculation of a limitations period, does not constitute extraordinary circumstances in an equitable tolling analysis. *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (attorney's reliance on standard mail resulted in a habeas petition being dismissed as untimely because it was filed one day late); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (attorney miscalculated limitations period, resulting in untimely petition); *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1313 (11th Cir. 2001) (attorney's erroneous advice to client resulted in untimely petition).

Petitioner has failed to demonstrate entitlement to equitable tolling of the limitations period.

IV. Certificate of Appealability

This Court should grant an application for certificate of appealability only if Petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims and procedural rulings debatable or wrong. Further, Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. Conclusion

Accordingly, it is **ORDERED** and **ADJUDGED**:

1. The Amended Petition for Writ of Habeas Corpus (Doc. 4) is **DENIED**, and the case is **DISMISSED** with prejudice.
2. Petitioner is **DENIED** a certificate of appealability.
3. The Clerk of Court shall enter judgment and close this case.

DONE and **ORDERED** in Orlando, Florida on April 13, 2022.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Heeralall Puran

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

HEERALALL PURAN,

Petitioner,

v. **Case No: 5:19-cv-537-RBD-PRL**

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Order of the Court entered on April 13, 2022, this case is hereby dismissed with prejudice.

ELIZABETH M. WARREN, CLERK

s/L. Burget, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).